

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Direct Access to the INTELSAT System

IB Docket No. 98-192
File No. 60-SAT-ISP-97

To: The Commission

**OPPOSITION OF THE SATELLITE USERS COALITION
TO REQUEST OF COMSAT CORPORATION
FOR STAY PENDING JUDICIAL REVIEW**

The Satellite Users Coalition – AT&T Corp. (“AT&T”), MCI WorldCom, Inc. (“MCI WorldCom”) and Sprint Communications Company L.P. (“Sprint”) – hereby oppose the October 6, 1999 request of COMSAT Corporation for a stay of the Direct Access Order¹ pending judicial review (“COMSAT Request”).

INTRODUCTION AND SUMMARY

Under the established four-prong test for stays pending judicial review, COMSAT must demonstrate that: (1) it is likely to succeed on the merits; (2) it will suffer irreparable harm absent a stay; (3) no substantial harm to other interested parties will result; and (4) grant of a stay is in the public interest.²

¹ Direct Access to the INTELSAT System, FCC 99-236, IB Docket No. 98-192 (rel. Sept. 16, 1999) (“Direct Access Order”).

² See Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977); Virginia Petroleum Jobbers Ass’n v. Federal Power Commission, 259 F.2d 921, 925 (D.C. Cir. 1958); Wisconsin Gas v. FERC, 758 F.2d 669, 673-74 (D.C. Cir. 1985).

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The COMSAT Request manifestly fails to meet this standard. **First**, on the merits, the Commission in the Direct Access Order reasonably construed the Satellite Act,³ and this construction is entitled to judicial deference under the rule of Chevron U.S.A. Inc. v. Natural Resources Defense Council.⁴ **Second**, COMSAT will not suffer irreparable harm. **Third**, a delay in implementation of direct access would significantly harm U.S. consumers by delaying the price reductions that will result from competition in the U.S. market for INTELSAT services. **Fourth**, a stay would not be in the public interest; in fact, it would delay the public interest benefits identified by the Commission when it made the decision to implement direct access.

ARGUMENT

I. COMSAT Is Unlikely to Succeed on the Merits Because the Court Will Defer to the Commission's Reasonable Construction of the Satellite Act

The COMSAT Request reargues at length the same issues that the FCC considered and decided in this rulemaking proceeding. AT&T, MCI WorldCom and Sprint, individually and as members of the Satellite Users Coalition, have addressed these issues in detail in the course of this proceeding.⁵ For purposes of responding to the COMSAT Request,

³ Communications Satellite Act of 1962, Pub. L. No. 87-624, 76 Stat. 425 (1962) (codified at 47 U.S.C. §§ 701-744) ("Satellite Act").

⁴ 467 U.S. 837 (1984).

⁵ See Comments of AT&T Corp. (Dec. 22, 1998); Comments of MCI WorldCom, Inc. (Dec. 22, 1998); Comments of Sprint Communications Company, L.P. (Dec. 22, 1998); Reply Comments of AT&T Corp. (Jan. 29, 1999); Reply Comments of MCI WorldCom, Inc. (Jan. 29, 1999); Letter from Satellite Users Coalition to the Commission (May 21, 1999) (attaching Satellite Users Coalition testimony to Senate Commerce Committee); Letter from MCI WorldCom to the Commission (June 30, 1999) (attaching presentation on INTELSAT Utilization Charges); Letter from Satellite Users Coalition to the Commission (Sept. 9, 1999) (attaching presentation on INTELSAT Utilization Charges).

however, the sufficient and dispositive point is that the decision in the Direct Access Order is fully consistent with the Satellite Act.

The Satellite Act does not give COMSAT exclusive rights of access to INTELSAT. In approving direct access, the Commission correctly construed the statute:

While Section 735(a)(2) authorizes Comsat to furnish “for hire channels of communication,” it does not specify exclusivity. . . . To the contrary, the language of the Satellite Act points to an opposite result. Congress required the Commission to insure that all present and future authorized carriers shall have “non-discriminatory use of, and equitable access to,” the system and to “regulate the manner in which available facilities of the system and stations are allocated among users. . . . Given the specified goals of the Satellite Act, that the corporation created to participate in the global system “be so organized and operated as to maintain and strengthen competition in the provision of communications services to the public,” we find no basis for implying exclusivity where none is specifically given.⁶

COMSAT’s expected challenge in court to this construction of the Satellite Act is not likely to succeed on the merits.

The court will review the Commission’s decision in the Direct Access Order under the standard of Chevron U.S.A. Inc. v. Natural Resources Defense Council.⁷ At a minimum, the Commission’s construction of the Satellite Act will be entitled to deference under

⁶ Direct Access Order, ¶ 152 (citations to 47 U.S.C. §§ 735(a), 721(c)(2), 701(c) omitted). Significantly, in contrast to the absence of language of exclusivity in Section 735(a)(2), Section 735(a)(1) (which the Commission found to confer exclusive rights on COMSAT, see id. ¶¶ 149-151) provides COMSAT with authority to “plan, initiate, construct, own, manage, and operate [INTELSAT] itself or in conjunction with foreign governments or business entities . . .,” 47 U.S.C. § 735(a)(1) (emphasis added). That is, the Satellite Act provides no role for U.S. entities other than COMSAT in Section 735(a)(1), but imposes no such limitation in Section 735(a)(2).

⁷ 467 U.S. 837 (1984).

the second prong of Chevron – i.e., “if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s [interpretation] is based on a permissible construction of the statute.”⁸ Given that the Satellite Act contains no language of exclusivity with respect to access to INTELSAT and that it explicitly requires the Commission to ensure non-discriminatory access to INTELSAT, the Commission’s construction of the statute is certainly a permissible one.

Furthermore, contrary to COMSAT’s contentions, the Commission’s construction of the Satellite Act is not inconsistent with the legislative history of the Act,⁹ which the Commission correctly recognized “at most depicts an expectation or predictions from non-legislators regarding Comsat’s role during the early years of the satellite system’s development.”¹⁰ Likewise, prior Commission and court decisions which referred to the de facto exclusive access of COMSAT to INTELSAT, without considering the permissibility of direct access, do not impair the Commission’s ability to consider that issue now.¹¹

COMSAT is also not likely to prevail on its arguments that the Direct Access Order violates the Takings Clause of the Constitution or that the Direct Access Order is arbitrary and capricious.¹² On COMSAT’s takings claim, the Commission correctly found that COMSAT has no property interest in exclusive access to INTELSAT and that, even if it had such an

⁸ Chevron, 467 U.S. at 843.

⁹ See COMSAT Request at 18-20.

¹⁰ Direct Access Order, ¶ 160.

¹¹ See COMSAT Request at 21-26; Direct Access Order, ¶¶ 166-172.

¹² COMSAT Request at 26-30.

interest, implementation of direct access would not effect a prohibited taking of COMSAT property or establish a basis for compensation.¹³ Finally, in the three areas in which COMSAT alleges arbitrary Commission decision-making – the effect of INTELSAT’s immunities, the level of the INTELSAT Utilization Charge (“IUC”) surcharge, and pass-through of cost savings to consumers¹⁴ – the Commission in fact carefully considered the arguments raised by COMSAT and did not rule against COMSAT arbitrarily.¹⁵

II. COMSAT Will Not Suffer Irreparable Harm From Competition for INTELSAT Services

COMSAT also does not satisfy the second requirement for a stay pending judicial review – i.e., a demonstration of irreparable harm. While COMSAT may suffer economic loss if it is no longer able to collect monopoly rents on INTELSAT access, COMSAT cannot demonstrate the irreparable harm necessary to support a stay of the Direct Access Order.

COMSAT’s irreparable harm argument essentially amounts to a claim that it will suffer economic injury as a result of the introduction of unwanted competition into the market for INTELSAT services. The courts have consistently found that “economic loss does not, in and of itself, constitute irreparable harm.”¹⁶

¹³ Direct Access Order, ¶¶ 179-200.

¹⁴ COMSAT Request at 27-30.

¹⁵ Direct Access Order, ¶¶ 101-116 (INTELSAT immunities), ¶¶ 51-86 (IUC surcharge), ¶¶ 35-40 (cost savings). If anything, the IUC surcharge calculated by the Commission was too high. The members of the Satellite Users Coalition reserve the right to contest further the IUC surcharge issue.

¹⁶ Wisconsin Gas Co. v. FERC, 758 F.2d 669, 674 (DC Cir. 1985).

In the unlikely event the appellate court were to reverse the Direct Access Order, customers would have no choice but to switch back to COMSAT, because there would be no other authorized U.S. provider of access to INTELSAT. Moreover, this switch would be highly unlikely to require any rerouting of communications by most of COMSAT's largest customers, like AT&T, MCI WorldCom and Sprint, who own INTELSAT earth stations and for whom COMSAT provides no facilities.

III. A Delay in Direct Access Will Harm U.S. Consumers and Carriers

The third critical stay factor – harm to other interested parties – cuts strongly against COMSAT, because a delay in competition would harm both U.S. carriers and consumers more than COMSAT. As the Commission found, “Level 3 direct access will lead to significant cost savings by INTELSAT users in the United States”¹⁷

U.S. carriers like AT&T, MCI WorldCom and Sprint would also be harmed by a delay in direct access. The Commission correctly found that “U.S. telecommunications service providers face a competitive disadvantage compared to foreign carriers that can obtain INTELSAT capacity at IUC rates”¹⁸

IV. A Stay Would Not Serve the Public Interest

COMSAT makes only a brief argument on the fourth stay factor – the effect on the public interest – and understandably so. The Commission determined in the Direct Access

¹⁷ Direct Access Order, ¶ 37; see also id., Tables D & E.

¹⁸ Id., ¶ 47.

Order that direct access is in the public interest,¹⁹ and there is no basis for revisiting that determination now.

CONCLUSION

For the reasons set forth above, the Commission should deny the COMSAT Request and implement the Direct Access Order as scheduled.²⁰

Respectfully submitted,

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Dated: October 13, 1999

¹⁹ Id., ¶¶ 20-50.

²⁰ COMSAT argues that the Direct Access Order “begin[s] implementing direct access within 21 days of public notice,” allegedly contrary to 5 U.S.C. § 553(d) and the 60-day implementation period stated elsewhere in the Direct Access Order. COMSAT Request at 12. In fact, the requirements to which COMSAT refers are ministerial preparations for implementation of direct access which plainly are not substantive rules covered by 5 U.S.C. § 553(d) and which are fully consistent with the implementation of direct access 60 days after publication of the Direct Access Order in the Federal Register.

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of October, 1999, I caused copies of the foregoing
Opposition of the Satellite Users Coalition to Request of COMSAT Corporation for Stay
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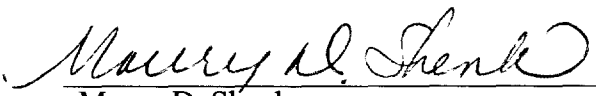
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